No. 565

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

TOWNSHIP OF MUSKEGON, a municipal corporation,
COUNTY OF MUSKEGON, a municipal corporation,
ORCHARD VIEW RURAL AGRICULTURAL SCHOOL DISTRICT NO. 5, MUSKEGON TOWNSHIP, a municipal corporation,

Appellees

vs.

CONTINENTAL MOTORS CORPORATION, a Virginia corporation doing business in the State of Michigan,

Appellant

and

UNITED STATES OF AMERICA,

Intervening Appellant

On Appeal from The Supreme Court of the State of Michigan

JURISDICTIONAL STATEMENT

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CITATIONS

Cases:

No.

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JURISDICTIONAL STATEMENT

Appellant, Continental Motors Corporation, appeals from the judgment of the Supreme Court of the State of Michigan, entered on June 25, 1956, affirming a judgment for appellees by the Circuit Court for Muskegon County, Michigan, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinions of the Circuit Court of Muskegon County, Michigan is not reported. A copy is attached hereto as Appendix A. The opinion of the Supreme Court of the State of Michigan is reported in 346 Mich. 218. A copy is attached hereto as Appendix C.

JURISDICTION

This suit was brought to collect unpaid 1954 taxes assessed pursuant to a statute of the State of Michigan (Act 189 of the Public Acts of Michigan for 1953). On August 23, 1955 judgment was entered in favor of the plaintiffs (appellees herein) by the Circuit Court for Muskegon County, Michigan, which on appeal was affirmed and judgment was entered on June 28, 1956 by the Supreme Court of the State of Michigan. Notice of Appeal was filed in the latter court on September 14, 1956. In both courts, appellants attacked the validity of the statute, pursuant to which the taxes were assessed, on the ground that it is repugnant to the United States Constitution and both courts decided in favor of the validity of the statute. The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, United States Code, Sections 1257(2) and 1201(3). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States et al v. Alle-*

gheny County, 322 U.S. 174, 192; *Standard Oil Co. v. Peck, Tax Commissioner et al*, 342 U.S. 382, 383; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 498.

STATUTE INVOLVED

Act No. 189 of the Public Acts of Michigan for 1953, p. 252 (Sees. 211.181 and 211.182, C.L. Mich. 1948, Vol. 5A, pages 530,531), hereinafter referred to as the Act or Act No. 189. The following is a full text thereof:

"211.181. Taxation of lessees and users of tax-exempt property; exception.

Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fairground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, that the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

211.182. Assessment and collection; action of assumpsit.

Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit."

QUESTIONS PRESENTED

Stated broadly, may a State or any subdivision thereof impose a valid tax upon the occupant of an industrial plant which is owned by the United States and immune from taxation, when (i) the occupant is engaged in business for a profit but uses the plant only with the permission of the United States and solely for the production of supplies required for the performance of contracts with the United States Army, and with the United States of America, and (ii) the occupant is taxed in the same amount and to the same extent as though such occupant were the owner of such plant? More particularly, the questions are these:

1. Is the Act, as here applied, repugnant to the Constitution of the United States and invalid for the reason that it imposes a tax upon property of the United States used exclusively for the production of defense materials for the United States and which is immune from taxation by the State of Michigan or its subdivisions?

2. Is the Act repugnant to the Constitution of the United States and invalid for the reason that it attempts indirectly to accomplish the unconstitutional purpose of imposing a tax upon property owned by the United States by provid

ing that the lessee or user of the property shall be taxed to the same extent and in the same manner as though such lessee or user was the owner of the property, except to the extent that the Federal Government makes payment in lieu of taxes with respect to the property?

3. If the Act may be construed as imposing a privilege tax, is it invalid, as here applied, for the reasons that it would impose a tax for the privilege of using federal property for the limited and sole purpose of providing materials for the common defense and supporting the army, which purposes are within the constitutional powers vested in the Federal Government and with respect to which Congress has legislated, and the exercise of the constitutional right of the Federal Government to dispose of and make all needful rules and regulations respecting its property in the carrying out of its functions may not be made the subject of a privilege tax by any state or its subdivisions?

4. If the Act may be construed as imposing a privilege tax, is it repugnant to the Constitution of the United States and invalid because it is discriminatory in its purpose and effect and is primarily directed at federally-owned property and is designed to subject to state taxation property which is constitutionally immune from such taxation?

5. Is immunity of federal property from taxation by a state determined by weighing the claimed burden upon a community or municipality against the benefits which the community or municipality derives as a result of the federal activity or by the claimed inequities arising between federal property which is immune from taxation and private property which is not?

STATEMENT OF THE CASE

Each of the appellees is a Michigan municipal corporation. They brought suit against the appellant, Continental Motors Corporation (hereinafter referred to as Continental), to collect unpaid 1954 taxes and fees totaling $84,892.28, together with interest and penalties thereon. These taxes had been assessed, pursuant to the Act, to Continental as the user and occupant of an industrial plant owned by the United States of America on tax day (i.e., January 1, 1954), located in Muskegon Township, Muskegon County, Michigan, and generally known and referred to in Government contracts and correspondence as "Plancor 166".

By agreement, made prior to tax day, between Continental and the United States of America, the latter agreed to furnish to Continental the right to use and occupy the lands, buildings and machinery comprising Plancor 166 for the production of supplies in the performance of certain contracts with the Ordnance Corps of the Department of the Army and with the United States of America. This right to use was terminable at will by the United States. Continental was not required to pay any rental and in turn agreed not to add to its prices charged for defense goods made in said plant any element of cost for occupancy. Throughout 1953 and 1954 the plant was used exclusively for the production of materiel as provided in the aforesaid agreement.

Plancor 166 was valued by the Muskegon Township Supervisor, as of January 1, 1954, precisely as he would have done had it then been owned in fee simple by Continental and precisely in the manner ad valorem taxes are assessed. The valuation of the real estate, thus determined, was $3,000,000 for one of the two parcels comprising the plant and $5,200 for the remaining parcel. These valuations were set down on the ad valorem general property tax rolls of the Township opposite the description of the parcel to which each pertained. Tax bills were issued to Continental, as the occupant of the plant, based upon the assessment. These bills were not paid.

On February 1, 1955, appellees commenced this suit against Continental in the Circuit Court for the County of Muskegon, Michigan averring that the taxes and collection fees were assessed to Continental for the year 1954 pursuant to the provisions of the Act. Continental filed its answer, denied a valid assessment had been made and plead, among other things, that the Act was void, an infringement upon the immunity of the Federal Government and of Federally-owned property, and repugnant to enumerated provisions of the Constitution of the United States. The detailed provisions of the plea may be found on pages 10 through 12 of the printed Record on Appeal to the Supreme Court of Michigan; as certified by the Clerk thereof and filed herein. Before trial, the United States of America was granted permission to intervene as a party defendant. The case was tried on its merits. On June 29, 1955 the trial judge, in his opinion (Appendix A hereto), pointed out that one of the questions before the Court was:

> "Whether the taxes assessed under Act 189, above, are an invasion of the federal right of immunity to taxation by any other taxing authority."

and after considering the matter at length, he reached the conclusion that:

"Act 189 does not violate federal immunity."

Judgment (Appendix B hereto) was entered against Continental in the Muskegon Circuit Court, and appellants filed a Claim of Appeal to the Supreme Court of the State of Michigan. Pursuant to the Rules of the latter court appellants filed a Statement of Reasons and Grounds for Appeal wherein they stated why the Act was invalid under the doctrine of Federal constitutional immunity and repugnant to the Constitution of the United States. See pages 218 and 219 of the above mentioned printed Record on Appeal.

Thereafter, Continental filed its brief with the Supreme Court of the State of Michigan, in which it set forth five questions as follows:

1. Does Act No. 189 of the Public Acts of Michigan for 1953 impose an ad valorem property tax or a privilege tax?

2. Is Act No. 189 of the Public Acts of Michigan for 1953 invalid because it attempts to impose an ad valorem tax upon real property which was owned by the United States, was used solely for its benefit and was otherwise immune from local ad valorem taxation by the mere device of stating that it was taxing the lessees or users thereof in the same amount and to the same extent as though such lessee or user was the owner of such property, and thus attempts to defeat the impact of Federal constitutional immunity?

3. Even if Act No. 189 imposes a privilege tax, may the use of Federally-owned property by a corporation (engaged in business for a profit) for the limited purpose of enabling the Federal Government to carry out its constitutional power to provide for the common defense and support of the Army, be made the direct subject of a privilege tax imposed by a state?

4. Even if Act No. 189 of the Public Acts of Michigan for 1953 imposes a privilege tax is it invalid as a privilege tax because it is discriminatory in purpose and effect, and is primarily directed at Federally-owned property and designed to subject to state taxation property which is constitutionally immune from such taxation?

5. May the doctrine of Federal constitutional immunity from local taxation be vitiated because of the "burden upon a community or municipality" or so-called inequities against property not immune?

and each was argued at length in the brief.

In its opinion (Appendix C hereto) the Supreme Court of Michigan concluded the Questions 1 and 2 of the five questions had been firmly resolved against Continental's contention in *United States* v. *City of Detroit*,* 345 Mich.

*In addition to the meritorious questions there raised by appellants, in the case at bar there is the additional important ground for supporting the proposition that Act 189 is repugnant to the Constitution of the United States because here the property was occupied for the sole purpose of providing defense materials and the tax is claimed by appellees to be upon a privilege granted by the United States for the purpose of carrying out a clear Constitutional duty whereas in the case of United States v. City of Detroit, the property was leased to a tenant and used by it for commercial purposes.

601, now appealed to the Supreme Court of the United States, and bearing number 487 in the October term. The Court failed to decide the third question. The Michigan Supreme Court concluded that Question 4 was without merit, and while failing to deal directly with Question 5, the tone and content of its opinion is such as to leave no doubt that the Court answered that question in the affirmative. The Court held that:

> "Act No. 189 is invalid and that the circuit judge was right in entering judgment for plaintiff local units by force thereof."

and affirmed the judgment below (Appendix D).

THE QUESTIONS ARE SUBSTANTIAL

The taxes, which appellees seek to recover herein, were levied pursuant to the Act. Appellant and intervening appellant attacked the validity of the Act, both in the trial court and later in the appellant court, on the ground that the Act was an infringement upon the doctrine of Federal immunity and repugnant to the Constitution of the United States. Each court decided in favor of the validity of the Act.

The question of whether or not the Act is repugnant to the Constitution of the United States is a matter of grave importance, not only to appellees and Continental but likewise to the United States of America and all taxing authorities wherever located. If the Act is valid as claimed by the appellees and the two courts below, the doctrine of

immunity of the Federal Government and its properties from State taxation can hereafter be successfully evaded by the simple device of taxing any user thereof, other than the Federal Government, even though such use may be solely for the purposes of carrying out objects clearly delegated to the Federal Government by the Constitution itself, such as the support of our Army and the defense of the nation. The impact of the lower courts' decisions, if permitted to stand, will clearly lead to similar legislation in other states and either (i) to a refusal by many contractors to use Government-owned property, unless the Government shall agree to pay taxes, such as these, imposed upon the contractor for the use thereof, or (ii) the operation of each property by the Government itself, thus imposing burdens and restraints upon the Federal Government which are neither countenanced or required by the United States Constitution. The doctrine of Federal immunity, the right of the Federal Government to use its property as it deems proper, and the clear necessity for a strong central government capable of carrying out its objects free of interference by any state or subdivision thereof are each dangerously imperiled by this unique statute and the clearly erroneous decisions of the lower courts supporting its validity."

The nub of the argument is whether the Act imposes an ad valorem tax as we contend of a privilege tax as appellees contend and if it is a privilege tax is it valid?

1. The Act has all the characteristics and qualities of an ad valorem tax. The tax, by its terms, is and in this case was assessed in the same manner as taxes are assessed to owners of real property; the cash value of the fee simple

ownership in the tax-exempt real property was determined exactly as if such property was subject to ad valorem real property taxes; and, the user of the property was taxed, as required by the Act, in the same amount that would have been taxed had the user been the owner of the property. *Cooley on Taxes*, Fourth Edition, Vol. 1, page 143, points out that an ad valorem tax is a tax upon the value of an article or thing. The Act is indeed a tax upon the value of the real property. If, however, it be construed as a tax upon the privilege of use, it is nonetheless a tax based upon the value of a thing, for as was pointed out in *Hereford v. Mason*, 300 U.S. 577, 582, 586:

> ". . . the privilege of use is only one attribute, among many, of the bundle of privileges that make up property . . ." and . . . "a tax upon use . . . is equivalent to a tax upon property . . ."

The Act, here being considered, is not couched in the language of a privilege tax nor is the tax graduated or measured in accordance with the exercise of the privilege to use. It is a tax based upon the value of Government property. In *United States v. Allegheny*, 322 U. S. 174, a tax based upon the value of Government property and imposed upon the bailee of such property was struck down with the statement at page 189, that:

> ". . . Government owned property, to the full extent of the Government interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

The assessment and tax thereon is invalid for all the reasons set forth in the *Allegheny* case. Calling an ad valorem tax a privilege tax does not make it a privilege tax. In

determining constitutional questions this Court looks to the substance and effect of the tax and is not bound by the State Court's determination thereof. See *United States* v. *Allegheny*, *supra*, where at page 184 it is said:

> "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."

However, if it be determined that the tax imposed is a privilege tax, which it is not, then it must be concluded for the reasons hereinafter set forth that the tax is also invalid.

2. The Federal constitutional power to make all needful rules respecting the property of the United States (Article IV, Sec. 3, Cl. 2), for the purpose of providing materials required for the common defense and support of the army (Article I, Secs. 8(1) and 12), is vested exclusively in the United States Government, cannot be denied or interfered with by any State, nor be made the subject of a State privilege tax. Were we to permit the State to lay a tax, such as this, upon those who have the privilege, granted to them by the Federal Government, of using its property solely for the purpose of enabling that Government to discharge the duties and exercise the powers exclusively granted to it under our Federal Constitution, we would indeed sanction an unlawful levy upon the means employed by the Federal Government to discharge its duties. In *Van Brocklin* v. *State of Tennessee*, 117 U.S. 151, 155, the United States Supreme Court said:

> "The sovereignty of a State . . . does not extend to those means which are employed by Congress to carry

> into execution powers conferred on that body by the people of the United States. *The attempt to use the taxing power of a State on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse because it is the assumption of a power which the people of a single State cannot give.*" (Emphasis supplied.)

The State can no more impose a privilege tax solely upon the *use of Government-owned property* than it can solely upon interstate commerce — both of which are clearly beyond the competence of the State to regulate or to tax. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 608-9; *Railway Express Agency v. Virginia*, 347 U. S. 359.

3. In such cases as *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1, and *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, all cited by the trial court, *the tax was not upon a privilege* or right to exercise a privilege *granted by the United States* pursuant to a clear constitutional power, *nor a tax upon* the use or *a privilege to use property owned by the United States*. The taxes there under consideration were general, non-discriminatory privilege taxes; for the most part relating to occupational privilege taxes. They were not limited in scope or operation — as is Act 189 — to Federally-owned property or to the exercise of a Federal function, either directly or indirectly. Act 189 is directed specifically at Federal property, or its use, as suggested by plaintiffs' counsel in one of their briefs in the trial court, in which they said:

> "It is clear that the legislature has Federally-owned property specifically in mind when it adopted Act 189."

There can be no doubt that an Act, so designed, discriminates against the exercise by the United States of power over its property. Such discrimination is recognized as a sufficient ground for holding invalid any taxation adversely affecting the use or enjoyment of such power.

It should be noted also that those subject to the Act are obliged to pay a tax which they cannot collect from the owner. No remedy has been provided for that purpose and any remedy, if it has been provided, would be ineffective against the sovereign rights of The United States. On the other hand, lessees of the vast bulk of the real property in Michigan, if they are taxed at all under Section 2113 of the Compiled Laws of Michigan for 1948, are given an effective remedy to collect such taxes from the owner of such realty. (Sec. 211.53, C.L. Mich. 1948). Thus, those few subject to Act 189, who use Federally owned tax immune real [illegible], find themselves carrying a burden not imposed upon any other lessee or user of real property in Michigan. This too constitutes an unlawful discrimination against those engaged in the use of Federally owned real property.

Indeed, the discrimination evident in this case is the natural consequence of an effort to circumvent or evade the impact of a basic constitutional immunity. State legislatures are not free to strike, indirectly under the guise of a privilege tax, when the apparent aim and effect of the tax is primarily directed at the avoidance of such constitutional immunity.

Miller v. *Milwaukee*, 272 U. S. 713; *Missouri* v. *Gehner*, 281 U. S. 313, 321-2; *Helvering* v. *Gerhardt*, 304 U. S. 405, 413; *New Jersey Realty Title Insurance Co.* v. *Div. of Tax Appeal*, 338 U. S. 665, 674-5; cf. *Pacific Co.* v. *Johnson*, 285 U. S. 480, 493-4.

4. The lower courts were obviously moved by hardships imposed if the doctrine of Federal Constitutional Immunity were honored and Act 189 were held invalid, as here applied. The Supreme Court of Michigan, in its opinion, favorably commented upon appellant's argument that Continental, having the use of tax-immune property, enjoyed the benefits of police and fire protection, roads, schools for the children of its employees and other benefits of local government, and the Court pointed out that the electors had been obliged to vote a substantial increase in their taxes in order to make school bonds salable due to the uncertainty as to whether Plancor 166 was subject to taxation. These, the Court concluded, give a special meaning to the legislative purposes in the conception and enactment of Act 189, which the Court said:

> "... simply forces lessees and users for profit of tax-exempt lands to shoulder with others the burdens that are attendant upon benefits all of the class receive."

V

Constitutional immunity of Federally owned property is not overturned because to honor the immunity would discriminate against property not immune or because it places an added burden against the community or municipality where such immune property is situated. Nor can the prin-

ciple of Federal Constitutional Immunity be vitiated because of any so-called "equitable" argument. The very same argument was urged in and rejected by the United States Supreme Court in the *Alleghenies* case, supra, in which the Court said at pages 189-191:

> "Each party urges equities in its favor . . .
>
> "Such considerations remind us of our heavy responsibility in deciding the issues but hardly provide a guide or alter the usual principles for decision. *The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization.* . . . We can only say that *our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies on petition to the Federal Congress, which also is their Congress.*" (Emphasis supplied.)

CONCLUSION

It is submitted that the decision of the Supreme Court of Michigan is erroneous. We believe the questions presented by this appeal are substantial and that they are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

November 1956.

Respectfully submitted

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APPENDIX A

Opinion of the Circuit Court for Muskegon County, Michigan

Plaintiffs bring this action for the collection of taxes assessed in the amount of $84,658.20 for the year 1954 against the defendant Continental Motors Corporation with respect to certain real estate, and improvements thereon, owned by the United States but occupied by Continental under permit granted solely for the purpose of producing certain military supplies and equipment for the Department of the Army. The United States of America was granted leave to intervene as a party-defendant under claim of interest in the litigation which it claimed it was entitled to protect.

On January 1, 1954, the United States of America was the owner of a certain manufacturing plant, Plancor 166, located in Muskegon Township, Muskegon County, Michigan. The United States furnished this plant and its equipment to Continental under a permit to manufacture certain military equipment and supplies. Continental occupied this plant for this purpose without charge on January 1, 1954.

It was stipulated by these parties that the supervisor of Muskegon Township made an assessment of all of the real property in his township liable to taxation on tax day, i.e. January 1, 1954, at the true cash value, as required of him under Section 7.27 M.S.A.

It was further stipulated by these parties that pursuant to Act No. 189 of the P.A. of 1953 (M.S.A. 7.7(5)), the supervisor also valued as of that date the real property occupied by Continental and owned by the United States.

referred to as Plancor 166, precisely as he would have done had such real property been owned in fee simple and occupied by Continental Motors Corporation; that he valued such real property at the true cash value of the fee simple ownership on the basis defined in Section 7.27 M.S.A., giving consideration to the advantages and disadvantages enumerated in such section; that the valuation of the real estate thus determined was $3,000,000.00 for the parcel described in EXHIBIT 7 and $5,200.00 for the parcel described in EXHIBIT 8, and such valuations were accordingly set down upon the tax rolls of such township opposite the description of the parcel to which each pertained and the aforesaid tax bills were thereafter issued by the Treasurer's office of the said Township to the defendant Continental Motors Corporation; that the parcels of real property described in such tax bills were not assessed to the occupant thereof pursuant to Section 7.3, M.S.A., and that the said supervisor did not determine as of January 1, 1954, the cash value of nor did he ever separately value the right to use and occupy such parcels granted to the defendant, Continental Motors Corporation, by the United States of America.

It was further stipulated by these parties that Continental Motors occupied these premises exclusively for the purposes outlined in the permits, EXHIBITS 1, 2, 3, and 4; that Continental is a corporation organized for profit, occupied these premises in connection with its business conducted for profit and made a profit out of such operations.

The taxes so assessed to Continental on January 1, 1954, have not been paid and plaintiffs seek to recover them by virtue of Act Act 189, P.A. 1953.

—

One of the questions before the court is whether the taxes assessed under Act 189 above, are an invasion of the Federal right of immunity to taxation by another taxing authority. Justice Jackson, in *U. S. v. County of Allegheny*, 322 U. S. 174, says:

> "Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand."

Certain generalizations appear with frequency in the opinions covering this subject. So we learn that taxes on the properties, functions and instrumentalities of the Government are under constitutional proscription. *Mayo v. U. S.*, 319 U. S. 441; *U. S. v. County of Allegheny, supra*; *Kern-Limerick, Inc., v. Scurlock*, 347 U. S. 110. At the same time we learn that taxes on the property, functions and profits of private interest are held valid. *James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342; and *Esso Standard Oil Co. v. Evans*, 345 U. S. 495. And from the last group of citations we learn that an economic burden is no longer a factor in drawing the line of demarcation. Likewise those cases refer to a so-called new look at the subject of tax jurisdiction. It now appears that if the tax under scrutiny is not a direct tax on the property, function or instrumentality of the Government and if it is not discriminatory it has a chance of survival.

Act 189, P.A. 1953, provides for taxation of lessees and users of tax-exempt property, when leased or used for profit. The incidence of the tax falls upon the lessee or

user and not upon the owner. The property covered is all tax-exempt property, whether belonging to the United States Government or to the State of Michigan or any of its municipalities or institutions. The conclusion is that this tax is neither direct nor discriminatory.

Defendants lay great store in *U. S. v. County of Allegheny, supra,* and the statement found in that opinion to the effect that:

> ". . . possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation."

There the court held that the value of machinery, owned by the United States Government, could not be added to the value of the real estate, owned by the lessee of the machinery in assessing the value of the plant for the purpose of levying a real property tax. The court considered such a tax as tax upon the Government's possessions. In a dissenting opinion, however, Justice Roberts thought that the court was again reverting to the use of the economic burden factor.

Our own State Supreme Court in *Fed. Reserve Bank v. Revenue Dep.*, 339 Mich. 587, at page 598, distinguishes *Esso* and *U. S. v. Allegheny County*, both supra, by stating:

> ". . . the reasoning of the court seems to boil down to that same concept, that it is the legal incidence and not the economic burden of a State tax to which the immunity or statutory exemption of a Federal instrumentality extends and that exemption of the intermediate person upon whom the legal incidence of the tax falls is not to be implied, regardless of the

fact that he passes its burden on to the United States, so long as Congress has not expressly exempted such person therefrom."

So this court concludes that Act 189 does not violate Federal immunity.

A second question before the court is whether Act 189 violates Article X, Section 7 of the Michigan Constitution. Our State Constitution there provides:

"All assessments hereafter authorized shall be on property at its cash value."

Does the fact that Act 189 requires the assessment against the owner to be for the same amount as though the user was the owner invalidate the tax? The reasonableness of this requirement is obvious. The worth of real estate bears some relationship to the burden it places upon a community or municipality. A large manufacturing plant brings into a community a relative number of employees with their families, homes and possessions. The burden upon the community is just the same whether the plant is immune from taxation or not. The property owner who is not immune is called upon to pay his fair share. It is equitable that the same basis should be used to require the user of immune or exempt property to pay its fair share. Any other basis would be unfair to the property owner tax payers. As this court views it, this is an indeterminate feature of Act 189.

While this language of Act 189 is inartistic and incomplete a careful reading of the title and contents results in a conclusion that it was the legislative intent to tax the lessees or users of tax exempt property and not the prop-

erty or any interest therein. To this extent it is a tax upon a certain class or group who qualify under the definitions and exceptions of the Act. It has characteristics of a specific tax. It is only when we look at the method of computation of the tax that we note any ad valorem features.

Mr. Justice Cooley in his work on Taxation (2nd Ed., p. 238) describes ad valorem taxes as follows:

> "Ad Valorem Taxes: A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. The statute laying them prescribes the rule, but requires the action of appraisers, in *apportioning them* between individuals. . ."

In the opinion of the court the State Constitution is not violated because the assessment was made at its cash value. The argument is made that the property taxes is the leasehold interest of the lessee or user. However, the language of the Act plainly states that the tax is on the *lessee* or *user*. In effect the Act provides that where the property is exempt from taxation but the lessee or user of the property qualifies the latter shall be taxed the amount that the owner would have paid except for the exemption.

Accordingly, the court finds that plaintiffs are entitled to a judgment against defendant Continental Motors Corporation in the amount of the tax, $84,658.20, together with such penalties and interest as provided by law, but without costs, a public question being here involved.

Dated: June 29, 1955.

RAYMOND L. SMITH
Circuit Judge Presiding

APPENDIX B

Judgment of the Circuit Court for Muskegon County, Michigan

In this cause the plaintiffs having brought suit to recover the sum of $84,658.20 representing taxes assessed to the defendant, Continental Motors Corporation, for the year 1954, together with interest and penalties thereon, and, proofs having been submitted and the Court having considered the arguments and briefs of counsel and having filed a written opinion in the said cause;

It Is Ordered that a judgment be and same hereby is entered in favor of the plaintiffs and against the defendant, Continental Motors Corporation, in the amount of $84,658.20, together with such penalties and interest as is provided by law, such penalties and interest to be computed and taxed as costs as of the time this judgment is paid, but without the usual taxable costs, however, a public question being involved.

Dated this 23rd day of August, 1955.

RAYMOND L. SMITH
Circuit Judge, Presiding

APPENDIX C

Opinion of the Supreme Court of Michigan

This case is a direct descendant of Continental Motors Corporation v. Township of Muskegon, et al., 346 Mich. 141. It marks the second and separate effort of a corporation hailing from Virginia and doing business for profit in Muskegon Township to find legal means of transferring its more than substantial share of the cost of local government to the shoulders of local payers of property taxes.

The property known in the records of both cases as Plancor 166 was deeded May 6, 1953 by RFC to the United States with result that on the next ensuing tax day (January 1, 1954) Plancor 166 concededly became and remained exempt from taxation. The fact of such conveyance was noted in the cited case at page 146 of the report and it with this suit transfers judicial attention from determination of validity of property taxes levied against Plancor 166, which title thereto stood in the name of RFC, to question whether the plaintiff taxing authorities lawfully assessed Continental, as continuing lessee for profit of Plancor 166 after title thereto passed to the United States, pursuant to PA 1953, No. 189*.

Turning now to Continental's status under said act 189 in conjunction with the present suit: The supplemental agreement, by which Continental continued to use and oc-

*CLS 1954, §§211.181, 211.182 [Stat. Ann 1955 Cum Supp. §§7.7(15), 7.7(16)]. The title clearly indicates the legislative purpose. It reads: "AN ACT to provide for the taxation of lessees and users of tax-exempt property."

cupy Plancor 166 following transfer of title to the United States, contains this self-explanatory covenant:

> "6. The Contractor[*] shall pay to the properly constituted authority or authorities as and when the same may become due and payable all taxes, assessments, excises and similar charges which may be lawfully taxed, assessed or imposed upon the Contractor with respect to or upon Plancor 166 or any part thereof, provided, however, that such taxes, assessments, excises or similar charges shall be prorated and apportioned as of the date of this Agreement and as of the date of determination thereof respectively. Nothing herein contained however, shall prohibit the Contractor from contesting in good faith the validity of any such taxes for assessments."

The 1954 assessment having been levied against Continental under said act 189 in the total sum of $84,051.76, and Continental having refused to pay, this suit to recover the levy followed. Trial to the court, Honorable Raymond L. Smith, circuit judge, presiding, resulted in judgment for the plaintiff local units in accordance with their declaration and the present appeal by Continental to this Court. The substantial questions before us are stated by Continental as follows:

> "1. Does Act No. 189 of the Public Acts of Michigan for 1953 impose an ad valorem property tax or a privilege tax?"

> "2. Is Act No. 189 of the Public Acts of Michigan for 1953 invalid because it attempts to impose

[*] Continental is the "Contractor".

an ad valorem tax upon real property which was owned by the United States, was used solely for its benefit and was otherwise immune from local ad valorem taxation by the mere device of stating that it was taxing the lessees or users thereof in the same amount and to the same extent as though such lessee or user was the owner of such property and thus attempts to defeat the impact of Federal constitutional immunity?"

"4. Even if Act No. 189 of the Public Acts of Michigan for 1953 imposes a privilege tax is it invalid as a privilege tax because it is descriminatory in purpose and effect, and is primarily directed at Federally-owned property and designed to subject to state taxation property which is constitutionally immune from such taxation?"

Stated questions 1 and 2 were firmly resolved against Continental's contention in *United States* v. *City of Detroit*, 345 Mich. 601, and it is unnecessary to repeat what was said of such issues on that occasion. Stated question 4, dealing with alleged invidious discrimination against lessees of tax-exempt property engaged as the statute says in "business conducted for profit", deserves and will receive consideration.

Continental's counsel say, in support of question 4:

"It should also be noted that those subject to the Act are obliged to pay a tax which they cannot collect from the owner. No remedy has been provided for that purpose and any remedy, if it had been provided, would be ineffective against the sovereign rights of The United States. On the other hand,

> lessees of the vast bulk of the real property in this State, if they are taxed at all under 78 M.S.A., are given an effective remedy to collect such taxes from the owner of such realty [7.97; M.S.A.]. Thus, those few subject to Act 189, who use Federally-owned tax-immune realty, find themselves carrying a burden not imposed upon any other lessee or user of real property in this State. This, too, constitutes an unlawful discrimination against those engaged in the use of Federally-owned real property."

The contention is without merit. Indeed, when it is searchingly examined in light of the companion records that are before us, we should in my view conclude that the legislature by Act 189 has widely effectuated its continuing duty of providing equal burdens and equal privileges for those of corresponding or similar situation. Without Act 189 a lessee or user for profit of federally-owned tax immune realty becomes specially privileged and notably favored over his local classmates, and I refer to that class which directly shares the burdens as well as the benefits of local government. As counsel for plaintiffs say:

> "When a large and valuable piece of property (cost, $8,352,768.30) which is tax exempt, is turned over, *rent free*, to a 'private individual, association or corporation' for use 'in connection with a business conducted for profit', it is quite obvious that the one having the use of such property has a valuable privilege. The one having the use of such property enjoys the benefits of police protection, fire protection, roads, schools for the children of his employees and the other benefits of local government."

Counsel conclude with observation that one enjoying such a privilege should, as a matter of justice, be required to contribute to the support of his or its local units of government. While they do not elaborate further, I think we should record *sua sponte* some of the facts proving dire and present accuracy of their representations in the field of education—a field corporations like Continental eagerly reap when the crops thereof ripen in our engineering schools. June 23, 1952, the plaintiff school district voted to issue bonds in the sum of $385,000 "for the purpose of erecting and furnishing an addition to the existing new school building in said district". The electors simultaneously provided 6 mills in accordance with Constitutional practice to support the issue. The bonds could not be sold. The reason is disclosed, this way, in a subsequent (December 30, 1952) resolution adopted by the board of education:

> "WHEREAS, no bids were submitted for the purchase of the said bonds because of uncertainly expressed by the prospective purchasers relative to the present and future liability for taxes of the Continental Aviation and Engineering Corporation plant located in the said School District, which plant, consisting of the land and buildings thereon, constituted some 52.79% of the total assessed valuation of the entire School District; . . ."

In these circumstances of necessity the property taxpayers and electors of the district were compelled at later special election to vote an additional 8 mills, making 14 mills in all extending from 1953 through 1971, to render the bonds

[1] This is Plan or 166.

salable. When judges consider, as the court did in *Brown v. Board of Education of Topeka*, 347 U. S. 483** (74 S. Ct. 86; 98 L. ed. 873), that "Today, education is perhaps the most important function of state and local governments", we arrive at special understanding of legislative purpose in the conception and enactment of Act 189. It simply forces lessees and users for profit of tax-exempt lands to shoulder with others of the class the burdens that are attendant upon benefits all of the class receive.

The *Slaughter-House* Cases (16 Wall. 36, 67-72, 21 L. ed. 394, 405-407; *Strauder v. West Virginia*, 100 U. S. 303, 307, 308, 25 L. ed. 664-666) were quoted with approval in the *Brown* case and, while not directly in point so far as Act 189 is concerned, the fact of such quotation is worthy of present consideration in that it brings to clearly focused light, again in this century, a predicative purpose of the Fourteenth Amendment that has always accompanied its prohibitory words—that of firm implication of right to positive immunity from legal discrimination. The implication thus becomes a continuing if unenforceable admonition to legislative assemblies of the several states that affirmative vigilance against and enactments preventive of inequality of legal protection are quite in order whenever such inequality exists or threatens. As the court said in *Strauder*:

> "The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immuni-

** This is the first of the so-called segregation cases.

> ties, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property."

Legislation designed toward equality in the sharing of burdens and benefits of local governments is reverence for rather than offense to our traditional right to equal protection of the laws. Act 189 is such legislation. It does not discriminate against lessees for profit of exempt property and commendably operates to prevent shocking discrimination in their favor. We accordingly hold as against this latest challenge that Act 189 is valid and that the circuit judge was right in entering judgment for the plaintiff local units by force thereof.

The presence of the United States as an intervening party is noted. The Government and its brief are welcome but do not distract from duty of determination whether the named defendant should or should not be judged liable to plaintiffs on account of the matters alleged in the declaration we have before us. This is a common law action brought by plaintiff units of local government. The declaration names a private corporation only as defendant. In the absence of Congressional action the judgment of the court below when and if paid will be retired exclusively by the private defendant and not by the United States. No judgment has been entered against the United States, directly or indirectly. No tax was or is levied against its property and sovereign immunity of the United States from taxation and suit is not involved.

The judgment of the circuit court should be affirmed, with costs to plaintiffs assessed against Continental only.

APPENDIX D

Judgment of the Supreme Court of Michigan

(Filed June 28, 1956)

The records and proceedings in this case having been brought to this Court by appeal from the Circuit Court for the County of Muskegon, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is No Error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Muskegon be and the same is hereby in all things affirmed, and that the plaintiffs do recover of the Continental Motors Corporation, their costs, to be taxed, and that they have execution therefor.